SUPREME COURT, U. S.

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No. 294

In the

Supreme Court of the United States

OCTOBER TERM, 1968

RICHARD HAUFF,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Richard Hauff, prays that a Writ of Certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINIONS OF THE COURT BELOW:

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on May 26, 1967. It is not reported but appears in the certified, printed appendix filed herewith.

The original opinion of the United States Court of Appeals for the Seventh Circuit filed May 27, 1968, but not published, is set forth in the appendix to this petition.

The order of the United States Court of Appeals for the Seventh Circuit, filed June 18, 1968, denying a petition for rehearing is also set forth in the appendix to this petition.

JURISDICTION

The order of the United States Court of Appeals, affirming the judgment and sentence of the United States District Court, was filed May 27, 1968. The petition for rehearing was denied June 18, 1968. This petition is seasonably filed under Rule 22 of this Court.

Jurisdiction in this Court to review the judgment below is provided in 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

Should not the trial court have allowed the motion of the defendant for an order directing the prosecution to not employ a prior conviction to impeach the defendant where appeal therefrom was pending?

Does not an unjustified, prearrest delay of more than two years, during which a material witness for the defense was shown to have died, require dismissal of the indictment and does not a failure to dismiss constitute a denial of due process of law, of a speedy trial, and an abdication of the duty of the court to prevent an unjust result?

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED.

Amendment V: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

Amendment VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ."

Title 18, *U.S.C., Section* 1343: "Whoever, having devised . . . any scheme . . . to defraud . . . , transmits or causes to be transmitted by means of wire . . . any writings . . . for the purpose of executing such scheme . . . shall be fined not more than $1,000.00 or imprisoned not more than five years, or both. . . ."

STATEMENT OF THE CASE.

The petitioner, Richard Hauff, was indicted in five counts charging a scheme to defraud by means, in part, of telegraph communications, contrary to Title 18, *U.S.C., Section* 1343.

He was tried by a jury and on May 26, 1967, a verdict of guilty was returned upon which judgment was entered and, on June 20, 1967, a sentence of 3 years was imposed on each count concurrently.

On May 27, 1968, the United States Court of Appeals affirmed the judgment and sentence.

On June 18, 1968, a petition for rehearing was denied.

STATEMENT OF FACTS

1. MOTION TO DISMISS INDICTMENT

In the fall of 1961, a Sidney Lederman informed the Chicago office of the Federal Bureau of Investigation that Richard Hauff had defrauded him into investing money in a Las Vegas Hotel scheme (App. 22-23) which was transmitted in part by telegraph.

In July of 1963, Richard Hauff called voluntarily at the Chicago office of the Federal Bureau of Investigation and informed an agent there that he had heard of the complaint against him and that the transaction between Mr. Lederman and him had been a loan, rather than an investment, unconnected with any Las Vegas venture as evidenced by an affidavit of Mr. Lederman and an account stated prepared by him as well which he exhibited to the agent (App. 22-23).

On November 15, 1967, an indictment based on Mr. Lederman's complaint was filed and Mr. Hauff was arrested thereon that same day (App. 2-3).

Mr. Hauff, thereafter, moved to dismiss the indictment because of alleged prejudicial, prearrest delay and, in support of his motion, filed an affidavit asserting the death of Mr. Silver and that Mr. Silver had been present at a conversation between Mr. Hauff and Mr. Lederman in which the dealings between them were discussed as a loan rather than an investment and that the delay in charging him with the offense had deprived him of this material evidence (App. 22-23).

The government offered no evidence to justify the delay. The court denied the motion (App. 8-9).

2. IMPEACHMENT BY USE OF PRIOR CONVICTION ON WHICH APPEAL WAS PENDING:

At the commencement of the trial, and prior to the commencement of the jury selection, the defendant moved the court to forbid the government from resorting to a prior conviction of the defendant to impeach him because appeal therefrom was pending (App. 10, 28-29).

The court denied the motion (App. 10-11, 28-29).

The defendant showed the prior conviction in his evidence-in-chief (App. 29).

REASONS FOR GRANTING THE WRIT

The court should grant the writ on two grounds:

1.

The matter of the prejudicial, prearrest delay is an important question of federal law which has not been, but should be, settled by this Court.

An inordinate delay between discovery of an offense against the United States and arrest and prosecution therefor that substantially prejudices the defense of the accused is a denial of due process of law, of the accused's right to a speedy trial, and requires the exercise of the court's supervisory power, on timely motion, to prevent an unjust result. *Ross* v. *United States,* 349 F. 2d 210, 211-212; (U.S.C.A. D.V., 1968) *Powell* v. *United States,* 352 F. 2d 705, 707-708; (U.S.C.A. D.C., 1965). *United States* v. *Feinberg,* 383 F. 2d 60, 65; (U.S.C.A. 2nd., 1967). *United States* v. *Sanchez,* 361 F. 2d 824, 825; (U.S.C.A., 2nd, 1966). *United States* v. *Deloney,* . . . F. 2d . . . (No. 16090, U.S.C.A., 7th, Jan. 25, 1968).

In the case on appeal the government had been in possession, since the fall of 1961, of the complaint of Sidney Lederman that the defendant, earlier in 1961, had defrauded him into investing money in a Las Vegas Hotel scheme (App. 22-23).

Furthermore, the defendant called at the Chicago office of the Federal Bureau of Investigation in July, 1963, and told that office that he had heard of the complaint and that the transaction between the complainant and himself was a loan, rather than an investment, unconnected with any Las Vegas Hotel Venture. (App. 22-23).

Nonetheless, no arrest was made nor was any indictment sought until November 15, 1965 (App. 1).

Meanwhile, on October 27, 1963, a Mr. Silver died. The defendant asserted by affidavit, supporting his pretrial motion to dismiss the indictment (App. 22-23), that Mr. Silver had been a witness to parts of the indictment transaction and would have corroborated the defendant's testimony that the dealings between him and the complainant were not an investment in a Las Vegas scheme but an unrelated loan.

This affidavit of the defendant setting forth the government's knowledge and delay and setting forth the substantial prejudice to himself stands uncontradicted in the record (App. 24-26).

Therefore, in that the government offered no explanation to justify a prearrest delay of twenty-eight months, and in that the defendant was deprived by the delay of a vital witness to support his defense, it must be allowed that he was substantially prejudiced by this undue procedure and was the victim of an unjust result.

2.

There is a conflict between the decisions of the United States Court of Appeals for the Seventh Circuit and the decisions of the United States Court of Appeals for the District of Columbia on the competency for impeachment of a prior conviction on which appeal is pending.

A defendant's prior conviction from which appeal is pending may not logically and should not properly be the subject of impeachment. *Campbell* v. *United States,* 176 F. 2d 45, 47 (U.S.C.A., D.C., 1949). Over objection, the court below permitted such evidence against the defendant (App. 28-29). Until a conviction has been affirmed there is no way to determine whether justice below miscarried. Moreover, the troubling prospect appears that the

second conviction might have turned on evidence of the first only to have the reviewing court, following the second conviction, hold that the first not be permitted to stand.

An even more ironic potential inheres in the circumstances surrounding the instant case. The prior conviction, used over objection against Richard Hauff (App. 28-30), is still pending in the United States Court of Appeals for the Seventh Circuit before whom there is pending a motion of the prosecution to remand the case for further hearing on questions of electronic surveillance (in the light of this court's order in *Kolod* v. *United States,* October Term, 1967, Docket Number 133, held for reargument at the 1968 term) and this case may well be reversed after the disposition of the present appeal unfavorably to the defendant.

To avoid such bizarre and unfair events, this Court should overrule *United States* v. *Empire Packing Co.,* 174 F. 2d 16, 20 (U.S.C.A., 7th, 1949) and *United States* v. *Hoffa,* et al, 367 F. 2d 698, 713-714 (U.S.C.A., 7th, 1966), and flatly hold that prior convictions on which appeals are pending shall not be admissible for purposes of impeachment. While this would appear to be the minority view, 16 *ALR* 3rd 726, 735, it also appears to have the solid support of reason.

CONCLUSION

The Court, in affirming the actions of the trial court overruling the motions to dismiss the indictment and to prevent the use of the defendant's prior conviction, from which appeal was pending, deprived the defendant of due process of law, his right to a speedy trial and the protection of the court against an unfair result.

Respectfully submitted,

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